RHB BANK BHD

v.

GUNASINGAM RAMASINGAM

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[SP NO: D5-24-120-2001]
7 JANUARY 2002

CIVIL PROCEDURE: *Injunction - Injunction to restrain winding up petition - Whether there was likelihood of commencement of a winding up proceeding - Whether threat of winding up proceeding sufficient for the application of injunctive relief - Section 218 Companies Act 1965 - Alternative means of recovering debt by writ of seizure and sale pursuant to O. 45 r. 1(a) Rules of the High Court 1980 - Whether injunction should be granted*

COMPANY LAW: *Winding up - Insolvency - Company proven commercially solvent - Whether has right to protect itself from being disturbed by a creditors' petition to wind it up - Whether injunction should be granted*

This was the plaintiff bank's application for an injunction to prohibit the defendant, a guarantor of a loan, from filing a statutory notice under s. 218 of the Companies Act 1965 to commence winding up of the plaintiff, based on a judgment in default obtained by the defendant against the plaintiff when the plaintiff failed to enter appearance in a previous civil suit. The plaintiff had applied to set aside that judgment. In anticipation that the defendant could attempt to enforce the judgment in default, the plaintiff deposited the judgment sum of the previous suit into court, pending its application to set aside the said judgment.

Held:

[1] The defendant did not indicate anywhere that he was not going to serve the s. 218 notice with a view to commence winding up of the plaintiff. Further, he had also not replied to the plaintiff's letter seeking a confirmation from the defendant that he will not serve the s. 218 notice on the plaintiff pending its payment into court of the judgment sum. Neither did the defendant deny in his affidavit that he would serve a s. 218 notice and commence a winding up proceeding against the plaintiff. (p 548 d-e)

[1a] It was therefore legitimate for the plaintiff to assume that its right to operate its banking business was being threatened by the likelihood of the commencement of a winding up proceeding that could have adversely affected its operation as a bank. That threat was sufficient for the plaintiff to apply for the injunctive relief. (p 548 f)

[2] The plaintiff was not insolvent. The fact that it had committed itself to deposit the judgment sum pending the decision of the court on its application to set aside the judgment in default, reinforces its capability to pay its debts. A company that has proven itself to be commercially solvent, has the right to protect itself from being disturbed by a creditors' petition to wind it up. If it could be determined that the petition is bound to fail, an injunction will lie. (pp 549 g & 550 h-i)

[3] A judgment creditor will not be acting *bona fide* if a direct alternative means of recovering his debt by a writ of seizure and sale under O. 45 r. 1(a) of the Rules of the High Court 1980 is available to him and he chooses not to pursue it. Provided there is a valid reason why that alternative means is not resorted to, it would be perfectly legitimate for the court to injunct the creditor from presenting the petition in order to prevent the company from suffering more harm than necessary. (pp 550 i & 551 a-b)

[Ordered in terms.]

Case(s) referred to:
Ng Ah Kway v. Tai Enterprise Sdn Bhd [1986] 1 MLJ 58 ***(refd)***
Re A Company [1915] 1 Ch 520 ***(refd)***
Re International Tin Council [1988] 3 WLR 1159 ***(refd)***
Re St Thomas Dock Co [1876] 2 Ch D 116 ***(refd)***
Bryanston Finance Ltd v. De Vires No 2 Ch 63 ***(foll)***

Legislation referred to:
Companies Act 1965, ss. 217, 218(1)(e), (2)
Rules of the High Court 1980, O. 45 r. 1(a)
Specific Relief Act 1950, s. 50

For the plaintiff - KK Wong (Anita Ibrahim); M/s Lee Hishammuddin
For the defendant - Gunasingam Ramasingam

Reported by Raja Vishnu Sivarajah

JUDGMENT

Kang Hwee Gee J:
By this application the plaintiff RHB Bank Berhad (formerly United Malayan Banking Corporation Berhad) seeks an injunction to prohibit the defendant from filing a statutory notice under s. 218 of the Companies Act 1965 to wind up the plaintiff based on the judgment sum of RM803,271.46 or part thereof obtained by the defendant in default of appearance, and to file a petition under s. 217 of the Companies Act 1965 to wind up the plaintiff based on the said judgment sum or part thereof.

The grounds for seeking the injunction is set out in the supporting affidavit of its Pengurus Jabatan Tugas-Tugas Khas, Mohamed Din Dato' Seri Hamidi (encl. 3) which may be summarised as follows:

The defendant had stood as a guarantor of a loan obtained by a person called Phee Ah Ang from the plaintiff's bank. Upon the said person defaulting in the repayment of the loan, the plaintiff commenced civil action D1-23-937-87 against the defendant and after a full hearing obtained judgment for the sum of RM223,562.39 on 23 Mei 1995.

The defendant did not appeal against the judgment but some two years later on 7 July 1997 filed an application to the Court of Appeal for extention of time to file an appeal and to reopen the case with leave to adduce further evidence therein. His application was however dismissed by the Court of Appeal.

Subsequently the defendant was adjudged a bankrupt at the instance of the plaintiff on 3 July 2000 in consequence of his inability to pay the judgment sum.

Earlier on 23 February 1999 the defendant had commenced civil suit D2-22-449-1999 against the plaintiff as a co-defendant with a person called DM Suppiah, a property valuer. In the suit the defendant alleged *inter alia* that they had committed fraud against him by issuing a false valuation of the land which was used as security for the loan in the civil suit D1-23-937-87 for which the plaintiff had already obtained judgment for the sum of RM223,562.39.

The plaintiff failed to enter an appearance to the defendant's suit in consequence of which the defendant obtained a judgment in default of appearance on 15 March 2001. On 20 April 2001 the defendant served on the plaintiff a copy of the judgment in default of appearance which he obtained in civil suit D2-22-449-1999.

The plaintiff has applied to set aside that judgment.

In anticipation that the defendant may attempt to enforce the judgment in default by issuing the statutory notice under s. 218(1) of the Companies Act and proceeding to petition for winding up, the plaintiff through its solicitors wrote to the defendant informing him that it would be depositing the judgment sum of RM803,271.46 into court pending its application to set aside the judgment. The letter also sought the defendant's confirmation that he would not in the meantime file the statutory notice. It read as follows:

26 April, 2001

MR. GUNASINGAM S/O RAMASINGAM URGENT
No. 31, Jalan Helang 3, BY HAND/FAX NO: 03-5756143/57566149
Bandar Puchong Jaya
47100 Puchong,
Selangor Darul Ehsan.

Dear Sir,

IN KUALA LUMPUR HIGH COURT SUIT NO. D2-22-449-99
GUNASINGAM S/O RAMASINGAM v. UNITED MALAYAN BANKING CORPORATION BERHAD & D.M. SUPPIAH

We refer to the above matter where we act for RHB Bank Berhad.

2. We have been instructed by our clients that our clients have received a copy of the judgment in default dated 12.4.2001 entered against United Malayan Banking Corporation Berhad in respect of the above matter ("Default Judgment").

3. We have been made to understand that without prejudice to our clients' right in respect of the Default Judgment, our clients are in process of paying into Court a sum of RM803,271.46 and costs amounting to RM225.00 ("Payment into Court").

4. In view of the Payment into Court, we are hereby instructed by our clients to seek a written confirmation from you on an URGENT basis that:

   (a) you refrain from commencing execution proceedings in respect of the Default Judgment; and

   (b) you refrain from serving on our clients a statutory demand under section 218(2)(a) of the Companies Act, 1965 ("Statutory Notice") based on the Default Judgment.

5. If we do not obtain your written confirmation as requested in the aforesaid paragraph 4 by 5:30 p.m., Thursday, 26 April 2001, we have our clients' strict instructions to:

   (a) apply for a stay of execution of the Default Judgment; and

   (b) apply for an injunction to restrain you from presenting the Statutory Notice.

Thank you.

Yours faithfully, For and on behalf of
LEE HISHAMMUDDIN

Sgd.

for Wong Kian Kheong
Direct line: 603-21658470
E-mail: wongkiankheong@leehishammuddin.com.my

c.c. clients

No reply was received from the defendant.

The defendant was not represented by counsel despite being advised to obtain one. Consequently, the two affidavits in reply which he filed to oppose this application were infirm of purpose. They failed to address the crucial legal issue whether the injunctive reliefs should be granted. Instead they were directed to justify his *locus standi* as a bankrupt to commence the civil suit against the plaintiff and the validity of the judgment in default of appearance that he had obtained. These are matters which would not be relevant, unfortunately - for reasons which will be clear later in my judgment.

It is true the defendant did not indicate anywhere that he is not going to serve the s. 218 notice with a view to commence winding up of the plaintiff. But he had also not replied to the plaintiff's letter (exh. A-6 encl. 3) seeking a confirmation from him that he will not serve the s. 218 notice on the plaintiff pending its payment into court of the judgment sum of RM803,271.46, obtained by him. Neither did the defendant deny in his affidavit that he would serve a s. 218 notice and commence a winding up proceeding against the plaintiff. It would therefore be perfectly legitimate for the plaintiff to assume that its right to operate its banking business is being threatened by the likelihood of the commencement of a winding up proceeding that would adversely affect its operation as a bank. That threat is sufficient for the plaintiff to apply for the injunctive reliefs.

A creditor who petitions the court to wind up a company under s. 218(e) of the Companies Act 1965 is not exercising his right *in personam* to execute a judgment debt against the company as he would in an execution proceeding, but merely his right *in rem* to claim against the assets of the company along with other creditors whom the company may be liable to upon being wound up. To quote Phillimore LJ in *Re A Company* [1915] 1 Ch 520 at 528, a view affirmed by the Court of Appeal in *Re International Tin Council* [1988] 3 WLR 1159:

> In some general loose sense an unsatisfied creditor may be said to be enforcing his judgment by presenting a petition for a winding-up. But, except that his judgment is evidence of his debt, a judgment creditor is in no better position for a winding-up than any other creditor ...

> She is not therefore seeking to enforce her judgment. She is proceeding to a new alternative mode of recovering her debt, a mode which she no longer seeks to recover for herself alone but for the benefit of all the creditors ...

It follows that a court undertaking an inquiry whether a company should be wound up under s. 218(e) is not bound to enquire whether the company would pay the petitioner's debt but whether it is generally able to pay its debts to its creditors.

It is significant to note that s. 218(1)(e) of the Act speaks of the company being "unable to pay its debts" as opposed to merely an unwillingness on its part to pay any isolated debt that it may owe to any creditor, although such a refusal would attract the deeming provision in s. 218(2) of the Act thereby placing upon the company the burden of proving that it is able to pay its debts. But once the company proves to the satisfaction of the court that it is not commercially insolvent, that is to say it is perfectly capable of paying all its debtors every sen in the ringgit, the fact that it would not pay the individual debt of the petitioner for whatever reasons private or otherwise, is quite irrelevant when deciding whether a winding up order should be made. The judgment debtor must in such a case take his remedy elsewhere - properly this should be by way an execution on the asset of the bank or even for committal for refusing to obey the order of the court. As Jessel MR said in *Re St Thomas Dock Co* [1876] 2 Ch D 116:

> The petition may be and probably is, presented with the idea of getting paid, not of getting paid under the winding up, but of getting paid by reason of the company not daring to meet the threat or risk of being wound up, which is I will not say an illegitimate use, but not the primary use of a petition for winding up of a company.

To return now to the instant case:

I will have to accept as true and accurate that the plaintiff's bank is not insolvent. The fact that its manager, Mohamed Din Dato' Seri Hamidi has committed himself to deposit a cheque for the judgment sum of RM803,496.46 pending the decision of the court on its application to set aside the judgment in default of appearance (which it had filed on 26 April 2000), reinforces its capability to do so. I have not the slightest doubt that the plaintiff is able to pay its debts.

Having decided that the plaintiff would be able to pay its debts, the question of whether the plaintiff is likely to succeed in setting aside the judgment in default of appearance obtained by the defendant in civil action D2-22-449-1999 is purely academic. So is the question of whether the defendant was legally competent to have initiated the civil action and obtained the judgment in default against the plaintiff without the prior approval of the official assignee. I do not therefore propose to deal with them in this application.

The power of the High Court to grant an injunction to restrain a petitioner from presenting a winding up petition is described by Stephenson LJ in *Bryanston Finance Ltd v. De Vires* No. 2 Ch 63 at 79C as "a facet of its inherent jurisdiction to prevent an abuse of its process". Here in our jurisdiction that power is not merely inherent but provided in clear terms in s. 50 of the Specific Relief Act 1950.

In deciding whether to exercise that jurisdiction specifically to injunct a person from filing a winding up petition against a company, the court would have to consider the statutory right of that person to present a petition on the one hand against the right of the company to be protected from such unwarranted intrusion of its operation on the other.

Bryanstone Finance has laid down the general principle that unless the company can show that the petition is *prima facie* bound to fail, a company is not entitled to an interlocutory injunction, a procedure which I would accept as more appropriate and specific for the purpose - in preference to Lord Diplock's 'balance of convenience' in *American Cyanamid*. Moreover that test (adopted and applied here in *Luggage Distributors*) is concerned with the grant of an interlocutory injunction whereas the injunction applied for in the instance is perpetual in nature *albeit* restrictive, respecting only the specific judgment in default obtained by the defendant.

I will have to accept the plaintiff's manager's averment that the service of the statutory notice under s. 218 of the Companies Act 1965 will adversely affect its banking operations involving some 182 branches in Malaysia with an aggregate deposits of some RM34 billion and that it may cause a run on the bank in consequence of which the whole banking industry may be affected.

The effect that a winding up petition may bring to a company particularly a bank is obvious. One needs only to reflect on what Shankar J (as he then was, quoting from the 13th edn, of Buckley on the Companies Act 1948), said in *Ng Ah Kway v. Tai Enterprise Sdn Bhd* [1986] 1 MLJ 58 at 64 that:

> Great damage may obviously be done to a solvent company by a winding-up petition presented by an unreasonable creditor, whose debt the company are able and willing to pay if established, but to whom they *bona fide* believe they are not indebted. In such a case, on a writ issued by the company, an injunction will be granted to restrain the creditor presenting the petition.

A company that has proven itself to be commercially solvent, has the right to protect itself from being disturbed by a creditors' petition to wind it up. And if it can be determined that the petition is (to use the test in *Bryanstone Finance, supra*) bound to fail, an injunction will lie. And to this may be added a rider. A creditor choosing to enforce his right to a debt by petitioning for

the winding up a company must act *bona fide* in pursuant of such a right. A failure to do so is an abuse of the process of the court. A judgment creditor will not be acting *bona fide* if a direct alternative means of recovering his debt by a writ of seizure and sale under O. 45 r. 1(a) is available to him and he chooses not to pursue it. Provided there is a valid reason why that alternative means is not resorted to, it would be perfectly legitimate for the court to adopt the Bentham utilitarian approach to injunct the creditor from presenting the petition in order to prevent the company from suffering more harm than necessary.

There shall accordingly be an order in terms with costs.